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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1826

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. Two themes dominate the briefs of respondents and their *amici*: the assertion that the legislative history of the Immigration Reform and Control Act of 1986 (IRCA) requires this Court to interpret IRCA "in a liberal and

generous fashion," Resp. Br. 4 (emphasis omitted); see Cities of Chicago et al. Br. 7-11; Church World Service Br. 7-13; and the contention that the Immigration and Naturalization Service (INS) implemented IRCA in a harsh and inhospitable manner, see, *e.g.*, Resp. Br. 5, 7-12. In our view, neither of those themes contributes to an appropriate analysis of the questions presented by our petition.[1]

a. First, as we explained in our reply brief at the petition stage (Pet. Reply Br. 9 n.11), general statements of liberal intent extracted from IRCA's legislative history are not useful in answering the questions presented in these cases, which turn on the provisions Congress chose to enact into law. Those provisions make clear that Congress did not intend to pursue the liberal and generous purposes behind IRCA "at all costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987). Rather, Congress imposed a number of significant limitations on the program, two of which are relevant here: it limited judicial review to a single, expedited course; and it limited relief to aliens who applied during a brief and specified time period. Those limitations cannot be explained as the product of the "liberal and generous" motives on which respondents rely; accordingly, we do not think that those motives offer a basis for departing from the language Congress chose to use when it enacted those limitations.[2]

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[1] Respondents also commence their brief by asserting (Resp. Br. 1) that the government's "statement of the opinions below is erroneous in several respects." Their discussion, however, does not identify any error in our statement; it simply includes a number of opinions to which our statement does not refer. They do not suggest that any of the opinions omitted from our statement contribute significantly to an understanding of the procedural background of the case or bear in any way on the questions presented by our petition.

[2] As this Court has explained, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

b. Second, the legalization program under IRCA was a great success. The estimates before Congress of the number of aliens who would be legalized under the program varied,[3] but it is clear that INS's implementation of the program resulted in substantially more applications than Congress expected: 1,750,530 as of June 27, 1992. See Gov't Br. 5 n.4. Moreover, the suggestion that INS interpreted the eligibility provisions in a manner calculated to limit the availability of relief to the aliens at whom the program was directed is belied by the objective fact that INS has granted about 94% of the applications it has processed to date. See Gov't Br. 5 & n.4.[4] Nor is it appropriate to assume, as respondents suggest (Resp. Br. 9 n.14, 14-15), that the regulations at issue in these cases clearly violated IRCA simply because the government chose not to challenge the district court orders invalidating those regulations. Given the limited effect of the regulations, which applied only to the program at issue in these cases, designed to end more than four years ago, the

[3] The Senate Report predicted 565,000 applications, S. Rep. No. 132, 99th Cong., 1st Sess. 64 (1985); the House Report predicted 1,400,000, H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. I, at 132 (1986).

[4] Respondents also suggest (Resp. Br. 9) that INS dragged its heels in implementing provisions of IRCA (codified at 8 U.S.C. 1255a(e)(1)) that granted some protections to aliens even before the application period began. INS's response on this point was entirely reasonable. The "telex" to which respondents refer, Legalization Wire # 1, CO 1588-P (Nov. 14, 1986), was a 20-page document providing detailed instructions to INS district offices regarding proper procedures for implementing 8 U.S.C. 1255a(e)(1). INS issued this document only eight days after the President signed IRCA into law. See J.A. 183 (reprinting a portion of the document). The entire document appears in the record as an attachment to the November 24, 1986, Decl. of Peter A. Schey, Clerk's Record (CSS) item 9.

government's decision is readily understandable on other grounds.

2. On the jurisdictional question, respondents make only a passing attempt (Resp. Br. 32 n.44) to rebut our analysis of the language of Section 1255a(f), choosing to rest their argument primarily on their view that this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), "broadly held" to the contrary (Resp. Br. 23-26), and on the contention that application of the statute as we understand it would be unduly harsh (Resp. Br. 28-32).[5] None of respondents' arguments on those three points is persuasive.

a. We explained in our opening brief that 8 U.S.C. 1255a(f)(1) bars the actions before the Court because each of the individual respondents challenges a regulation delineating the qualifications for adjustment of status, because each regulation is a "determination,"[6] and

[5] Respondents also assert (Resp. Br. 32-34) that Congress's incorporation of 8 U.S.C. 1105a into Section 1255a(f) "shows that district court review of systemic practices and regulations is appropriate." Resp. Br. 32. As we explained in the petition (Pet. 14 n.17), Section 1105a actually supports our position, because it would be odd to conclude that exhaustion is not required under Section 1255a—with its express preclusion of alternate forms of judicial review—in circumstances (like these) where Section 1105a itself would require exhaustion. Moreover, as we pointed out in our reply brief at the petition stage, respondents' construction of Section 1105a is unsupported in the decisions of the lower courts on which respondents rely. As we explained there, all of those decisions "involve challenges to allegedly improper procedures; none involves a claim that the agency improperly interpreted the substantive requirements for relief." Pet. Reply Br. 7; see Pet. Reply Br. 7 n.8 (describing the facts of respondents' cases). Respondents have not attempted to rebut our description of those cases; indeed, their brief on the merits simply duplicates the citations contained in their brief in opposition. See Resp. Br. 33 n.45; Br. in Opp. 21 n.23.

[6] Respondents' amicus American Bar Association (ABA) contends that our reading of the term "determination" is implausible, arguing

because, with regard to each of those aliens' claims, each regulation is a determination "respecting [that alien's] application for adjustment of status."[7] Gov't Br. 17-19.

that Congress intended to incorporate into Section 1255a(f)(1) the distinction between a "rule" and an "adjudication" as those terms are defined in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* ABA Br. 5-6. Section 1255a(f)(1), however, contains neither the term "rule" nor the term "adjudication"; if anything, Congress's decision not to use the well-recognized terms found in the APA suggests that it intended a different meaning.

The ABA also criticizes our reading of the term "determination" as leading to the "anomalous result that the administrative appellate authority * * * would have the power to entertain facial challenges to the regulations themselves." ABA Br. 6. That criticism is incorrect. Although the Legalization Appeals Unit (which is under the direction of the Associate Commissioner for Examinations) gives content to the regulations by construing them and determining how they apply in individual cases, it is bound by the regulations themselves, because the Attorney General has adopted them. See *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1023 (5th Cir. 1990) ("The INS cannot permit the LAU to deviate from the regulations. Once regulations are enacted, the INS, and even the Attorney General, who oversees and commands the Service, are required to comply with their commands."); 8 U.S.C. 1103(a) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. 103.1(f) (delegation of authority to the Associate Commissioner for Examinations, which does not include authority to overturn regulations). Instead, the validity of the regulations should be tested by the regional courts of appeals on review of final orders of deportation.

[7] We see no force in the ABA's argument (ABA Br. 6 & n.3) that the reference in Section 1255a(f)(1) to a determination "respecting" an application cannot bear the meaning customarily accorded the term "respecting," based on the ABA's view that the phrase must have the same meaning as the reference in Section 1255a(f)(3)(b) to a determination "on" an application. Because that argument rests on the premise that the two different phrases should bear identical meanings, it runs into the considerable headwind posed by the principle that courts should be reluctant to assume that Congress used different phrases to express the same concept. Moreover, the different contexts in which the phrases appear lend support to the view that the different phrases

Respondents do not directly address our interpretation of the statutory language, but instead suggest (Resp. Br. 32 n.44) that Congress considered, and rejected, our position when it failed to adopt a related Senate bill, S. 1200, 99th Cong., 1st Sess. (1985). S. 1200, however, would have barred all judicial review whatsoever with respect to any "decision or determination under [Section 1255a]." S. 1200, *supra*, § 202 (proposed 8 U.S.C. 1255a(f)(1)). The fact that Congress chose a narrower preclusion of review provision, which plainly permits judicial review of *some* INS actions under Section 1255a, does not shed a great deal of light on the question before the Court: how far did Congress go in allowing judicial review.[8] The best guide on that question is the language of the statute Congress enacted.

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should have different meanings. Paragraph (1) of 1255a(f) is the preclusion of review provision, which contains the broadest language in the entire subsection—channelling all litigation regarding any "determination" that "respect[s] an application" into one course of review. Paragraphs (3) and (4), which provide the avenues for review, logically might refer to narrower classes of determinations, reflecting a congressional decision that a "determination" should be subject to certain types of review only at certain stages in the process: paragraph (3) contemplates review of a determination "on" an application, based on the view that administrative appellate review would be applied only to determinations that have reached the stage of denial of a particular application, see 8 C.F.R. 103.1(f)(2)(xxvii), 245a.2(p) (providing for administrative review in those circumstances); and paragraph (4) contemplates review only of a "denial" of an application. See Gov't B 19 & n.18.

[8] We do note, however, that some of respondents' specific comments about S. 1200 are misleading. First, we are unable to understand respondents' suggestion (Resp. Br. 32 n.44) that Section 1255a(f)(1) somehow fails to refer to regulatory determinations under Section 1255a(g) because, in respondents' view, Section 1255a(f)(1) does not refer to "this section." Section 1255a(f)(1), like the analogous provision in S. 1200, describes the type of determination as to which judicial review is precluded as a "determination * * * under this section." Because subsection (g) appears in Section 1255a—the same section that Section

b. Although respondents rely heavily on this Court's decision in *McNary*, their presentation makes it clear that they can prevail only under a reading of *McNary* that divorces that decision from the situation before the Court in that case. As respondents implicitly acknowledge, they can prevail only if *McNary* "broadly held" that individuals seeking legalization can bring any claim whatsoever directly in the district courts, provided they bring the claim in the form of a class action, challenging application of an INS policy to more than a single individual. See, *e.g.*, Resp. Br. 24 (IRCA's preclusion provisions "apply *only* to individual challenges to those policies applied on a case-by-case basis").[9] Hence, they must present *McNary* as a case

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1255a(f) appears in—determinations under subsection (g) are covered by the statutory language.

Second, we see no substance to the argument that the preclusion provisions in Section 1255a(f) cannot apply to determinations made under Section 1255a(g), because "in the final version of IRCA" the authority to promulgate regulations appears later in the statute than the preclusion provisions in Section 1255a(f). Resp. Br. 32 n.44; see ABA Br. 7 n.3. The provisions appeared in the same order in S. 1200, which plainly contemplated preclusion of review with respect to the claims at issue in this case, by precluding all judicial review of *any* claim. See S. 1200, § 202 (proposed 8 U.S.C. 1255a(f) and (g)).

[9] Respondents' amicus ABA argues at length (ABA Br. 16-24) that the efficiencies inherent in class actions support a ruling in respondents' favor, suggesting that our position is designed to "preclude amnesty applicants from proceeding as a class under Fed. R. Civ. P. 23." *Id.* at 16. This case presents no issue under Rule 23; whatever claims aliens are permitted to bring in district courts, they will be able to bring them as class actions if they can satisfy the requirements of Rule 23. *McNary* itself is evidence that such class actions can proceed in certain circumstances. The issue in this case, by contrast, is whether the claims respondents present are cognizable by the district courts at all. In any event, as the protracted proceedings in this case make clear, a complicated class action in the district court is not invariably the most efficient way to secure a speedy and definitive resolution of a legal question that arises out of INS's construction of IRCA. In some cases,

that "broadly held" that the preclusion provisions apply only to a challenge to the denial of a single application. *Id.* at 23. But whether one agrees with the Ninth Circuit's decision in these cases or the D.C. Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), it is untenable to characterize *McNary*'s holding so broadly, because the facts of the case before the Court in *McNary* did not present any occasion for such a broad holding. As we explained in our opening brief (Gov't Br. 20-23), a major focal point of the decision in *McNary* was the conclusion that denial of jurisdiction would "foreclose all forms of meaningful judicial review." 111 S. Ct. at 898. Faced with that point, the Court concluded that "[t]he strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of [IRCA]." *Id.* at 899. Because that presumption is not applicable here, *McNary*—although relevant—does not control the decision of these cases.

c. As the court's decision in *McNary* makes clear, a key factor in these cases is the availability of effective judicial review to respondents under Section 1255a(f). Although respondents argue that the system Congress created in Section 1255a(f) is inadequate (Resp. Br. 28-32), that argument rests on an inaccurate description of several aspects of the process, coupled with a fundamental disagreement with the policy choices Congress made when it enacted Section 1255a(f).

The portion of respondents' brief that addresses the availability of judicial review makes two inaccurate statements about INS's procedures. First, respondents contend that established INS policies barred individual

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it would be swifter to follow the way designed by Congress—challenging the legalization decision directly in the court of appeals, as a defense to any deportation order the Attorney General might issue.

members of the respondent classes from filing applications for legalization. See, *e.g.*, Resp. Br. 16-17; 29. In support of that contention, respondents point out that INS's Legalization Manual required clerks to reject an application "if the applicant is statutorily ineligible." J.A. 188 (quoted at Resp. Br. 16). Although respondents suggest that the Manual reflects a draconian desire to trick eligible individuals into forfeiting their claims for relief, a fair reading suggests a much more charitable concern: in light of the significant filing fees,[10] it is not at all unreasonable of INS to inform aliens of its view that their applications are deficient *before* it accepts the filing fee, so that they can make an informed choice about whether to pay the fee if they are not going to receive immediate relief. Moreover, contrary to respondents' assertions, the policy did not bar applicants from seeking relief through normal channels if they believed INS had erred; the very same page of the Legalization Manual provides: "If an applicant whose application has been rejected * * * insists on filing, the application will be routed through a fee clerk to an adjudicator with a routing slip * * * stating the noted deficiency(ies)." J.A. 188. Hence, INS procedures would have allowed members of the respondent classes to file applications if they wished to challenge INS's view that they were not entitled to relief.

Second, respondents state twice (Resp. Br. 28 n.36, 30 n.39) that an alien would not be able to secure review of an adverse legalization determination by surrendering to INS. That statement is incorrect; any alien who wishes to challenge an adverse determination on his legalization application may secure review by surrendering for

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[10] The fees for filing a legalization application (Form I-687) range from $185 for an individual to $420 for a family. 8 C.F.R. 103.7(b).